# WATER PRIVATIZATION AND THE CASE FOR A PUBLIC MODEL

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## I. INTRODUCTION

The privatization of water systems and wastewater treatment systems previously operated by the government poses a vastly overlooked risk to public rights in the United States. This risk is exacerbated by the unique disposition of water as our lifeblood. All social, political, and economic systems depend on this finite resource for survival; yet the protections currently in place are far from adequate to protect this resource, and there are no guarantees that people will receive sufficient water to meet their basic needs.

The ongoing water privatization and litigation surrounding Flint, Michigan echo similar underlying themes present in the water privatization model in Buenos Aires, Argentina in the 1990s.[1] Such an

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initiative also entails greater accountability processes that are tasked with promoting access to clean and safe water. Improvements should be based on the crucial understanding of the need for rigorous enforcement and accountability mechanisms in water distribution models.

This Note approaches the topic of water privatization from a relatively broad understanding. It analyses the regulation, development, management, abuse, and use of water for private gain. The term "water" encompasses water sources like groundwater and surface water, as well as water for human use and consumption, including for drinking supplies and industrial and commercial use.

Inherent government functions are the roles that require public officials, as agents of the state, to act as the final arbiters. While there are a variety of definitions of inherent government functions, there are two generally accepted definitions. The first is the statutory definition found in the Federal Activities Inventory Reform Act of 1998, which states that an inherent government function is "a function that is so intimately related to the public interest as to require performance by Federal Government employees."[2] The second is a policy-based definition derived from the U.S. Office of Management and Budget Circular A-76, which states that an inherent government activity is "any activity that is so intimately related to the public interest as to mandate performance by" government personnel.[3] While these two definitions are nominally separate and derived from different sources, they are not substantially dissimilar.

Oversight of government functions is only effective when the oversight officials exercise the authority vested upon them to effectively monitor such functions.[4] Private contractors performing the roles and duties of government actors and executing essential government functions serve to undermine the effectiveness of these functions and the public perception of government officers. In dissociating government services from government oversight and completely divesting

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1 *See* Daniel Santoro, *The 'Aguas' Tango: Cashing In On Buenos Aires' Privatization*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Feb. 6, 2003), https://www.icij.org/investigations/waterbarons/aguas-tango/ [https://perma.cc/4JC9-4M9R]; Bérengère Sim, *Poor and African American in Flint: The Water Crisis and Its Trapped Population*, *in* THE STATE OF ENVIRONMENTAL MIGRATION 2016: A REVIEW OF 2015, at 77 (François Gemenne, Caroline Zickgraf & Dina Ionesco eds., 2016).

2 Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105–270, § 5(2)(A), 112 Stat. 2384.

3 45 C.F.R. § 2544.110(d) (2021).

4 Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 400 (2006).

these services to privatized, corporatized entities, the quality and allocation of these services are subject to the whims of the private entities, leaving communities with little means to implement checks and balances.

The frequent justification for privatization of essential government functions is that private companies are more efficient because they are specialized in the provision of these services and are driven "by market competition to provide higher-quality and lower-cost services."[5] Thus, these services are contracted out to private entities under the allure of cheaper, faster, and more innovative and customer friendly services. Proponents of privatization believe that the market will improve the services provided by a monopolistic bureaucracy.[6] They assert that the underlying justification behind contract privatization is that "the government lacks the required expertise to make day-to-day decisions that a private organization will have."[7] Contract privatization also creates competition in the industry that is impossible to foster when there is a government monopoly.[8]

The purported advantages of utilizing private contractors, which often have greater capital access and can conduct services with greater efficiency, suggest that using them could potentially reduce costs while accelerating coverage and ameliorating quality of service.[9] Despite at least one study in which the World Bank demonstrated that there was little to no efficiency benefit of using private contractors for water services, the perception that water privatization and market-based competition for supposedly efficient water supply and services is prevalent, and that perception has added to the significant trend of transferals of water services from governmental to private oversight.[10]

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5 Jon Michaels, *How the American Government Slowly Became a Business*, GUARDIAN (Dec. 11, 2017), https://www.theguardian.com/commentisfree/2017/dec/18/american-government-business-privatisation-jon-michaels [https://perma.cc/QNB2-YHSL].

6 Verkuil, *supra* note 4, at 400.

7 Elana Ramos, *The Dangers of Water Privatization: An Exploration of the Discriminatory Practices of Private Water Companies*, 7 BARRY U. ENV'T & EARTH L.J. 188, 194 (2017); *see also* Robert W. Poole Jr., *Privatization*, LIBR. ECON. & LIBERTY, https://www.econlib.org/library/Enc/Privatization.html [https://perma.cc/5PGH-TC6T] (last visited Feb. 18, 2022).

8 *See* Poole, *supra* note 7.

9 *See* Verkuil, *supra* note 4.

10 *See generally* Antonio Estache, Sergio Perelman & Lourdes Trujillo, *Infrastructure Performance and Reform in Developing and Transition Economies: Evidence from a Survey of Productivity Measures* (World Bank Pol'y Rsch., Working Paper No. 3514, 2005), https://openknowledge.worldbank.org/handle/10986/8844 [https://perma.cc/ASV3-QJDT].

Privatizing essential government functions underlies the complete divergence in purpose between a private entity and a government agency. Government agencies are bound to public goals and accountability to their electorate and, as such, are responsive to the checks and balances that exist within government structures. Private companies are not necessarily responsive to the same democratic pressures that government agencies are responsive to. Private companies are instead largely profit driven.

Even worse, granting private monopolies in a specific area that was once an essential government function "invites abuse and calls into question the legitimacy of state power funneled through private (or marketized) conduits."[11] Considering the arguably greater consequences of potential mismanagement under private ownership or operation, and because responsible management of one of the most fundamental resources for human survival is irreconcilable with the profit-seeking of private entities, perhaps the provision of basic water supplies and water resources are best managed when public regulatory bodies are equipped with effective means of accountability and transparency.

The transfer of authority over a previously government-provided service into the hands of private entities also poses substantive procedural issues, such as whether public law checks and balances and accountability measures accompany these transfers to private hands and whether private parties wield de facto absolute power over the goods and services they provide for the public.

This Note explores the effects of water privatization in Flint, Michigan, compares them to the effects of water privatization in post-1992 Argentina, and discusses the differences that could be made with changes to privatization laws. The situation in Flint is analogous to the monopolization and privatization of water in Buenos Aires, which had foreseeable and discriminatory implications for the most vulnerable individuals in both cities. In Flint and Buenos Aires, water privatization vastly widened the economic divide and gave rise to human rights violations.

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11 Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 587 (2015).

## II. BACKGROUND INFORMATION

### *A. Buenos Aires, Argentina*

The results of privatizing water were exposed by the water concession outsourced by the Buenos Aires government throughout the late twentieth century. Though the government paraded this shift to private provision of public services as beneficial to the greater public good, the divergence of goals of public and private entities was starkly realized. Water privatization allows for water to be freely tradable, with little to no government regulation as to how, when, and where water is used or allocated.

In Argentina, from 1993 to 1999, the municipal water supply was controlled by companies with regional monopolies.[12] Due to its massive market demand for water in proportion to the rest of the country, Buenos Aires was roughly divided into two water supply chains.[13] Although privatization was initially driven by the need to alleviate the financial burden on public utilities and to encourage the private sector to become involved in pressing expansion requirements throughout the region, it actually resulted in egregious price gouging, with indigenous and minority groups bearing the brunt of the lack of water supply.[14]

Under pressure from the World Bank, the International Monetary Fund ("IMF"), the United States, and Argentina privatized Buenos Aires's water utility, with private companies claiming that they would be better able to provide access to water and sewage connections to poor areas.[15] The Argentine government justified this shift to private control as a necessary means for accessing healthy and environmentally sound water and sewage services, all with the cheapest possible rate as guaranteed by market forces that influence private companies in ways that government entities are shielded from.[16]

Contemporaneously, Argentina was emerging from a string of economic crises that produced overwhelming hyperinflation—inflation reached over 5000% in 1989—and it was thought that auctioning

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12 Santoro, *supra* note 1.

13 *Id.*

14 *Id.*

15 *Id.*

16 Carlos M. Vilas, *Water Privatization in Buenos Aires*, N. AM. CONG. ON LATIN AM. (Sept. 25, 2007), https://nacla.org/article/water-privatization-buenos-aires [https://perma.cc/G9KM-HE8M].

off state agencies could help recuperate the domestic economy.[17] Many believed that a radical reduction in government expenditures could help Argentina recover from the economic crisis and prevent its resurgence.[18] Argentina's shift from publicly provided basic necessities to a private model whose mandate was primarily to maximize profit reveals the dangers involved in this shift from public to private.[19]

The Argentine government granted the water concession to a consortium controlled by two major French water barons, the Compagnie Générale des Eaux (now Veolia) and Lyonnaise des Eaux (now Suez Environment).[20] Under the agreement, the consortium would deliver reduced water rates and "improve and . . . expand water and sewage services."[21] Suez's extensive connections to powerful multilateral financial institutions, such as the IMF and the World Bank (both institutions had pressured Argentina to quickly privatize their public utility systems), proved useful in the negotiation of the Buenos Aires water concession.[22] The French companies were granted one of the largest concessions for water privatizations in the world at the time, which covered 9.3 million people and was responsible for the entirety of downtown Buenos Aires and fourteen neighboring municipalities.[23] A governmental regulatory body, Ente Tripartito de Obras y Servicios Sanitarios ("ETOSS"), was established to oversee the corporate privatization scheme.[24] ETOSS was tasked with the purported mission "to monitor the quality of service, represent customers[,] and ensure the private company lived up to its contract."[25]

The consortium failed to deliver on these promises.[26] In successive years, the consortium increased water rates and charged large connection fees to customers for whom payment was least economically feasible, especially those in more distant and less developed

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17 Santoro, *supra* note 1.

18 Vilas, *supra* note 16.

19 *Id.*

20 Santoro, *supra* note 1.

21 *Id.*

22 Vilas, *supra* note 16.

23 *Argentina: A Grand Experiment in Water Privatization That Failed*, MÉTÉOPOLITIQUE, https://web.archive.org/web/20201129140345/https://meteopolitique.com/Fiches/eau/privatisation/Analyse/2004-3/dead/08.htm [https://perma.cc/KG7T-J43S] (last visited Feb. 18, 2022).

24 *Id.*

25 *Id.*

26 Santoro, *supra* note 1.

areas of Buenos Aires.[27] The Argentine government then "gutted its regulatory oversight of the company."[28] The water corporations were also dumping sewage waste directly into rivers surrounding Buenos Aires's poorest neighborhoods, the same populations that they were cruelly charging the most.[29]

Soon after its creation and implementation, the corporate water barons demanded that ETOSS grant them the ability to increase rates.[30] These private entities claimed that there were extraordinary unforeseen costs of expanding service to difficult-to-reach municipalities, and that the transition from well water to modern plumbing proved too expensive.[31] Thus, only eight months after the start of the water concession, they were permitted to increase costs by 13.5%, which included increases of 83.7% for basic water connection fees, forty-two percent for sewage, and thirty-eight to forty-five percent for other charges.[32] Despite repeatedly claiming increasing operational costs, as well as taking advantage of the Argentine recession, the company's profit margin remained above twenty percent.[33] These profit margins translated to over $50 million in net profits in just the second year of the system's operation.[34]

Even during this initial period, ETOSS noted the neglect of contractual obligations to implement expanded services, which were the original justifications for the rate increases.[35] Though these initial rate hikes were justified under a pretense of expanded water distribution services and accessibility, the subsequent increases in water rates demonstrated a different reality. The first decade of operation saw an average household's water bill increase by eighty-eight percent, with a net profit-to-sales ratio of thirteen percent for the consortium.[36] Social scientists described this eighty-eight percent increase as bearing no relationship to the inflation rate at the time and expressed concern

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27 *Id.*

28 *Id.*

29 Sebastian Hacher, *Argentina Water Privatization Scheme Runs Dry*, CORPWATCH (Feb. 26, 2004), https://corpwatch.org/article/argentina-water-privatization-scheme-runs-dry [https://perma.cc/ND33-U3VW].

30 *Id.*

31 *Id.*

32 Vilas, *supra* note 16.

33 Hacher, *supra* note 29.

34 Vilas, *supra* note 16.

35 *Id.*

36 *Id.*

over the twenty percent profit margin, which was far higher than what was considered acceptable for water industries in other states.[37]

ETOSS itself was not immune to backlash, which was unsurprising considering how toothless it was in ensuring rigorous regulatory enforcement over Aguas Argentinas, the name of the corporate privatization scheme.[38] Argentina's then-auditor general criticized ETOSS for the delay in construction of sewage and drainage facilities and its excessive delay in applying promised penalties against Aguas Argentinas.[39] ETOSS had previously levied $16 million in fines against Aguas Argentinas for missing deadlines on its obligations to deliver on contractual commitments such as expanded services throughout all of the greater Buenos Aires metropolitan area.[40] Aguas Argentinas disputed these claims and refused to pay the stipulated fines, and its behavior was implicitly condoned by the Argentine government when the government later stepped in to cancel $10 million of the fines as part of the second round of contracts.[41]

Aguas Argentinas' claims of debt and unexpected operational costs were not its only issues. Despite their promised agreement to deliver safe and clean water to some of Buenos Aires's poorest neighborhoods, water quality was nonetheless rife with issues, such as water pressure complications and water quality problems, as "nitrates and other contaminants [were] present in quantities above and beyond what [was] deemed acceptable by sanitation authorities."[42] These were not the only contractual breaches. Claims ranged from the "quality of service, unwillingness to hand over—and repeatedly concealing—information requested by ETOSS, and huge temporary cuts in water service due to preventable technical failures."[43]

Even during the latter years of its implementation, as the concession began to expand its water service, this expansion was executed at the expense of sewage and drainage services, especially in the heavily populated parts of the greater Buenos Aires area.[44] This resulted in the millions of people who populated these areas—people overwhelmingly of meager economic means—facing serious health and

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37 Hacher, *supra* note 29.
38 Santoro, *supra* note 1.
39 *Id.*
40 *Id.*
41 *Id.*
42 Vilas, *supra* note 16.
43 *Id.*
44 *Id.*

environmental harms.[45] These neighborhoods were rife with overflowing cesspools as a result of the lack of sewage and drainage services, leading to over ninety-five percent of the city's sewage being "dumped directly in the Río de la Plata."[46]

Despite the increase of water services to some of the households in this region, without the necessary sewage and drainage systems to safely and effectively relieve these households of wastewater, they were forced to dump their sewage into either makeshift septic tanks or directly onto streets and open fields.[47] This had the devastating effect of destabilizing the surrounding area, causing buildings and pavement to sink and the rampant spread of waterborne diseases.[48] During the era of the water concession in Argentina, painful intestinal bugs caused twenty percent of infant deaths.[49] La Mantaza—one of the poorest districts in the greater Buenos Aires metropolitan area—had no sewers, so the rain flooded houses and septic tanks, causing overflow of wastewater and sewage into its drinking wells, where water became suspiciously murky.[50] Residents in La Mantaza resorted to boiling water as the only means of water treatment; and even then, not all residents were able to afford the gas used to boil the water.[51] Residents in these neighborhoods reported becoming sick after ingesting water from these cloudy wells.[52]

The Río de la Plata, once known for its likeness to a clear freshwater sea, became one of the few rivers in the world whose pollution could be seen from space.[53] One of the neighborhoods adjacent to the river became known as "Villa Inflamable" because companies dumped their sewage directly into the area without treatment.[54] The deterioration of "Villa Inflamable" and other neighborhoods was due to the behavior of the water companies. Although Aguas Argentinas transported the sewage waste of over 5.7 million people, only twelve percent of the total wastewater received full sewage treatment, with the rest directly dumped into the Río de la Plata.[55]

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45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*
49 Santoro, *supra* note 1.
50 *Id.*
51 *Id.*
52 *Id.*
53 Hacher, *supra* note 29.
54 *Id.*
55 *Id.*

Aguas Argentinas maintained throughout this period that the increase in contamination of the Río de la Plata was in no way related to the quality of the water produced and distributed by its company.[56] Though water company executives conceded that certain services stopped, they nonetheless resisted backlash by excusing their patterns of abuse with statements emphasizing the expansion of water delivery while ignoring the lack of requisite sewage and drainage programs to truly ensure safe drinking water.[57] They continuously pointed to the expansion of services to over 1.6 million people throughout the greater Buenos Aires metropolitan area, over half of whom lived under the poverty line.[58]

Studies from this era support the testimony of residents in the neighborhoods adjacent to the Río de la Plata, demonstrating that the water was unfit for human consumption in seven districts of the greater Buenos Aires area.[59] Another study conducted by the Environmental Chemistry and Biogeochemical Laboratory at the Faculty of Natural Sciences revealed that the fish in the same areas were contaminated with highly carcinogenic substances, including substances that are used in the production of various chemical weapons such as napalm and Agent Orange.[60]

Severe poverty was widespread just as Argentina was emerging from a series of economic crises.[61] Many who lacked access to potable water and sewage services, particularly Argentina's poorest citizens, were also subject to low wages and high unemployment rates.[62] This confluence of various economic tensions made it even more difficult for poverty-stricken communities to afford the water services, especially with rate hikes. Private water companies, such as Aguas Argentinas, were hesitant to invest in service expansions to such regions because these expansions were unlikely to recover the investment needed to provide these services and even less likely to incur profits, which led to little improvement of the existing water services.[63]

Private water companies provided suboptimal service quality because their main priority was capitalization through their monopoly; they were more concerned with capital than with health outcomes or

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56 *Id.*
57 Santoro, *supra* note 1.
58 *Id.*
59 Hacher, *supra* note 29.
60 *Id.*
61 Vilas, *supra* note 16.
62 *Id.*
63 *Id.*

increased access for poverty-stricken regions. Street protests began in 1996 as concerns over water quality and availability increased.[64] The same year, as a result of growing civil protest, the Argentine bi-cameral congressional commission found that Aguas Argentinas had committed serious and grave breaches of contract and that it was not meeting its goals for renovating water and sewage networks.[65] In response to these protests and the findings from this congressional commission, in 1997 the Argentine President Carlos Menem removed ETOSS's power to negotiate with the water companies and gave it to the Minister of Natural Resources and Sustainable Development.[66]

The Ministry failed to uphold regulatory responsibility or exercise accountability in response to the outcry, and nonetheless simply finalized a new contract with Aguas Argentinas.[67] This new contract expanded opportunities for Aguas Argentinas to raise rates and gave it additional time to expand coverage.[68] Later, the contractual provisions that would have imposed sanctions if Aguas Argentinas failed to meet investment deadlines for coverage expansion and lowering of rates were removed without any similar provisions to replace them.[69]

This second round of contract renegotiations also failed to hold Aguas Argentinas responsible for some of the major promises that induced the original contract, including the desperately needed wastewater treatment plant and sewerage projects, which were supposed to be built within the first five years of the concession.[70] While millions of people waited for expanded sewage and drainage systems, investors in the water companies siphoned off enormous dividends and government officials enriched themselves.[71] During this period, many members of the federal cabinet and other political institutions were able to find high paying jobs as executives in these water companies after leaving their elected posts.[72]

The failure to hold water companies in Buenos Aires to any meaningful oversight had predictable results. By 2002, water prices in

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64 MÉTÉOPOLITIQUE, *supra* note 23.

65 *Id.*; Santoro, *supra* note 1.

66 MÉTÉOPOLITIQUE, *supra* note 23.

67 *Id.*

68 *Id.*

69 *Id.*; Hacher, *supra* note 29 (detailing monetary fines as well as potential administrative and criminal investigations for non-fulfilment of contractual obligations).

70 Vilas, *supra* note 16.

71 Santoro, *supra* note 1.

72 *Id.*

the city had increased by 177% since the beginning of the private contract.[73] The situation was exacerbated by contemporaneous economic crises and the succession of unstable federal governments, which led to the devaluing of the Argentine peso by two-thirds.[74] This caused even those who were once middle class to become poor overnight, thereby increasing the demographic of Argentines who were no longer capable of paying for rising water rates.[75] Thus, the problems were not limited to the increase in water rates and failure to deliver upon contractual promises of expanded services, but also extended to inflation and widespread suffering.

Buenos Aires's experience with water privatization demonstrated the ongoing tension between government aims, such as public health and social development, and the aims of private entities whose for-profit model is driven less by ameliorating social good and more by maximizing profits.[76] If private entities are primarily involved in the provision of public goods merely to return a profit, without the same checks and balances that exist for public safety standards, the effects are deepening existing inequalities. That privatization readily exposed existing economic disparities is perhaps derived from the very model of privatization: governments seeking to attract private entities need to sell these services as financially feasible and profitable.

Private companies are inherently driven by profit and therefore will not agree to provide services where they do not foresee a reasonable return on their investment. This motivation means that governments offer greater concessions to lure and maintain these privatization agreements.[77] In order to maintain this profit driven model, government oversight bodies are rendered toothless in their duties, as private companies repeatedly increase the prices of their services while relying on the existing concessions given to them to offset their operating costs.[78] The result of Argentina's experiment with water privatization has been an ongoing saga, as there has been an explosion of unregulated water concessions and poverty-stricken localities left without service,[79] further exacerbating the very issues that the government sought to rectify through privatization in the first place.

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73 MÉTÉOPOLITIQUE, *supra* note 23.

74 *Id.*

75 *Id.*

76 Vilas, *supra* note 16.

77 Santoro, *supra* note 1.

78 *Id.*

79 Daniel Gutman, *Access to Water Is a Daily Battle in Poor Neighborhoods in Buenos Aires*, INTER PRESS SERV. (Mar. 19, 2019),

### *B. Flint, Michigan*

Similar to the poverty-stricken communities that bore the brunt of Buenos Aires's experimentation with water privatization—forcibly relegated to the edges of the municipal scheme—those who are suffering the most from the privatization of water in Flint, Michigan are communities of color that have limited economic means to access clean water.[80]

Flint was supplied water from Lake Huron from 1964 to April of 2014.[81] In 2013, the state treasurer made a recommendation to then-Governor Richard Snyder to authorize the local oversight committee to switch to the Flint River as the source.[82] This recommendation was made despite knowing of a "2011 study commissioned by Flint officials . . . caution[ing] against the use of Flint River water as a source of drinking water and despite the absence of any independent state scientific assessment of the suitability of using water drawn from the Flint River as drinking water."[83] The same 2011 study found that Flint River's "long dormant water treatment plant would require facility upgrades costing millions of dollars."[84] Despite Flint's water treatment plant's laboratory and water quality supervisor's protests, and warnings that Flint's water treatment plant was not fit to begin operations, the switch from Lake Huron to the Flint River was made.[85]

Issues and concerns about water quality were raised in 2013.[86] Officials began receiving complaints about water quality from Flint residents less than a month after its initiation.[87] Less than six months later, the General Motors plant in Flint "announced that it was discontinuing the use of Flint water in its Flint plant due to concerns about

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http://www.ipsnews.net/2019/03/access-water-daily-battle-poor-neighborhoods-buenos-aires [https://perma.cc/XC5P-2FDN] (reporting on the experiences of residents in the greater Buenos Aires area who, as of 2019, still have difficulty accessing clean drinking water); NETHERLANDS WATER PARTNERSHIP, PARTNERS FOR WATER, COUNTRY UPDATE ARGENTINA 21 (2021), https://www.netherlandswaterpartnership.com/sites/nwp_corp/files/2021-07/Argentina-Country-Update-July-2021.pdf [https://perma.cc/57KN-DWYK] (reporting on the existing "low coverage and unequal distribution of water and sewerage services" in Buenos Aires, particularly in the outskirts of the greater Buenos Aires metropolitan area).

80 Sim, *supra* note 1, at 78.

81 Mays v. Governor of Mich., 954 N.W.2d 139, 145 (Mich. 2020).

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.* at 145–46.

87 *Id.* at 145.

the corrosive nature of the water."[88] The U.S. Environmental Protection Agency ("EPA") even advised the Michigan Department of Environmental Quality ("MDEQ") that "the Flint water supply was contaminated with iron at levels so high that the testing instruments could not measure the exact level."[89] MDEQ was also advised by the EPA that the "black sediment found in some of the tap water was lead."[90]

Although alarm bells were raised by residents, experts, and regulatory bodies, "state officials failed to take any significant remedial measures to address the growing public health threat posed by the contaminated water."[91] They were "continu[ing] to downplay the health risk and [were] advis[ing] Flint water users that it was safe to drink the tap water[,] while at the same time arranging for state employees in Flint to drink water from water coolers installed in state buildings."[92]

During March of 2015, state officials continued to downplay the seriousness of the lead poisoning, actively concealing the dangers of heavy metals in the tap water, working to discredit reports that were contrary to their public statements of safe and clean water, and repeatedly advising the public that the Flint tap water was safe to consume.[93] As Flint residents continued to rely on the private sector provided water supply, Flint state employees were provided with bottled water in coolers since January of 2015, amidst growing awareness of the contamination of the water supply.[94] Michigan continued to supply its own employees with bottled water for over a year before Governor Snyder declared a state of emergency.[95]

The crises in Buenos Aires and Flint have another significant factor in common: the involvement of a French private water company. In Flint's case, it was Veolia, one of the world's largest suppliers of water services, who contracted with the City of Flint around the time that lead levels rose in their drinking water.[96] While the increased

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88 *Id.* at 146.

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

94 Adam Chandler, *State Workers in Flint Got Clean Water Over a Year Ago*, ATLANTIC (Jan. 28, 2016), https://www.theatlantic.com/national/archive/2016/01/water-crisis-flint-state-employees/433872 [https://perma.cc/B7F3-CMG2].

95 *Id.*

96 Leana Hosea, *From Pittsburgh to Flint, the Dire Consequences of Giving Private Companies Responsibility for Ailing Public Water Systems*, INTERCEPT (May

levels of lead in the City's water were a product of its decision to switch the water source from Lake Huron to the Flint River—which predates Veolia's involvement—Veolia's operational conduct has contributed to and exacerbated Flint's lead poisoning.[97] In 2015, Veolia submitted a water quality report to the Flint City Council Public Works Committee, which stated that "the water is considered to meet drinking water requirements."[98] Similar to Buenos Aires, where impoverished municipalities that were unable to maintain their own water sources and distribution were essentially forced to sell off their authority to the highest bidder, "Veolia [preyed] on cities that [were not] getting the federal investment they need[ed] to upkeep their systems."[99] Another similarity is the increased levels of heavy metals in both cities. Under Veolia's leadership, cheaper but ultimately more corrosive heavy metals were introduced into the drinking water.[100]

The economic vulnerability of cities like Buenos Aires and Flint situates them as particularly easy prey to private water companies, especially when such cities rarely receive the federal funding that they need to maintain their water systems.

## III. LEGAL BARRIERS TO ACCOUNTABILITY IN PRIVATE MODELS

Individual cases brought before the judiciary have valiantly fought to provide remedies for Flint residents who were harmed by the disastrous model of water provision in the community.[101] Because these individual cases served to address wrongs done upon private actors and provide remedies to individual harms, however, it would be unreasonable to expect these kinds of cases to achieve wholesale restructuring of oversight bodies for the provision of water. This perhaps points to other avenues, including cases brought with different claims or legislative changes, that may be looked at to overhaul the existing privatized models of water distribution to incorporate greater public oversight. This Part explores the successes and limitations of a prominent case that arose out of the Flint water crisis which sought

20, 2018), https://theintercept.com/2018/05/20/pittsburgh-flint-veolia-privatization-public-water-systems-lead/ [https://perma.cc/NVX6-59KL].

97 *Id.*

98 VEOLIA N. AMER., FLINT, MICHIGAN WATER QUALITY REPORT 2 (2015); *see* Hosea, *supra* note 96.

99 Hosea, *supra* note 96.

100 *Id.*

101 *See* In re Flint Water Cases, 960 F.3d 303 (6th Cir. 2020); Mollie Soloway, *Measuring Environmental Justice: Analysis of Progress Under Presidents Bush, Obama, and Trump*, 51 ENV'T. L. REP. 10038, 10043–44 (2021).

remedies for individual harms, as well as the challenges to broader environmental justice claims and the potential legislative changes that could be implemented to rectify these challenges and create more rigorous opportunities for impacted communities to seek redress.

In *Mays v. Snyder*, Flint residents alleged due process violations against the Governor of Michigan, State of Michigan, Emergency Managers of Flint, and various public works and environmental quality officials, for replacing Flint's drinking water with water with corrosive contaminants and dangerous levels of lead.[102] Plaintiffs raised substantive due process claims, alleging that government agents acting in their official capacity intruded upon individuals' bodies against their wills.[103] The plaintiffs claimed that they suffered a "[v]iolation of the right to bodily integrity involv[ing] 'an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective.'"[104] The plaintiffs alleged that replacing their drinking water's source harmed their property, caused physical and emotional injury, and violated their right to bodily integrity.[105] The intermediate court in *Mays* found that the plaintiffs, largely Flint residents,

> clearly allege a nonconsensual entry of contaminated and toxic water into their bodies as a direct result of defendants' decision to pump water from the Flint River into their homes and defendants' affirmative act of physically switching the water source . . .. [The Court] can conceive of no legitimate governmental objective for this violation of plaintiffs' bodily integrity.[106]

The Michigan Court of Appeals also cited *Votta v. Castellani*, which held that because the "substantive component of due process encompasses . . . an individual's right to bodily integrity free from unjustifiable government interference,"[107] an inquiry "into whether the conduct infringing on that constitutionally protected interest was unconstitutionally arbitrary . . . requires that it 'shock[ ] the conscience and [be] so brutal and offensive that it d[oes] not comport with traditional ideas of fair play and decency.'"[108] Therefore this conduct must

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102 Mays v. Snyder, 916 N.W.2d 227, 242 (Mich. Ct. App. 2018).

103 *Id.*

104 *Id.* at 261 (quoting Rogers v. Little Rock, 152 F.3d 790, 797 (8th Cir. 1998); U.S. CONST. amend. 14; MICH. CONST. art. 1, § 17.

105 *Mays*, 916 N.W.2d at 242.

106 *Id.* at 261–62.

107 *Id.* at 261 (quoting Lombardi v. Whitman, 485 F.3d 73, 79 (2d Cir. 2007)).

108 Votta v. Castellani, 600 F. App'x 16, 18 (2d Cir. 2015) (quoting Sacramento v. Lewis, 523 U.S. 883, 847 (1998)).

meet a higher burden than mere negligence, and must be "intended to injure in some way [that is] unjustifiable by any government interest."[109] As such, the intentional conduct must be with deliberate indifference, where a state actor must "know[] of and disregard[] an excessive risk to [the complaintant's] health or safety."[110]

In *Mays*, the plaintiffs pursued claims based on more than a merely negligent decision to change water sources; the state's initial plans to change water sources and subsequent insufficient responses to citizens' complaints pointed toward conduct that unjustifiably shocked the conscience. Based on the various sources of concern from regulatory bodies, environmental experts, and residents, the City government and water oversight authorities "had time for deliberation in their decisions to expose Flint residents to toxic water, and their decision to do so was made with deliberate indifference to the known serious medical risks."[111]

The Supreme Court of Michigan held that the government's actions led to a "public health crisis of the government's own making, intentionally concealed by state actors despite their knowledge that Flint residents were being harmed so long as the untreated water continued to flow through their pipes."[112] The Court affirmed the lower court's holding that the plaintiffs sustained the claim of violation to their due process right to bodily integrity.[113] The *Mays* case was later consolidated with *Waid v. Snyder* to form *In re Flint Water Cases*, which was later appealed to the Sixth Circuit, likewise concurring with the Michigan Court of Appeals' finding that the plaintiffs sustained their bodily integrity substantive due process claims.[114]

While the *Mays* decision could be hailed as a success for similarly situated individuals who have suffered exposure to environmental harms and damage through the intentional actions of government actors, it is significant to note the overwhelming amount of specific allegations presented to support the harms and damages to Flint residents. Flint residents were able to detail years' worth of public reporting on the dangerous levels of toxins and corrosives in their

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109 *Mays*, 916 N.W.2d at 262 (quoting *Votta*, 600 F. App'x at 18).

110 *Id.* (quoting Ewolski v. City of Brunswick, 287 F.3d 492, 513 (6th Cir. 2002)); Farmer v. Brennan, 511 U.S. 825, 837 (1970).

111 Mays v. Governor of Mich., 954 N.W.2d 139, 159 (Mich. 2020).

112 *Id.*

113 *Id.* at 158.

114 *See* In re Flint Water Cases, 960 F.3d 303 (6th Cir. 2020) (denying qualified immunity to the city and state officers on the plaintiffs' bodily integrity claims).

water source and on the deliberate neglect of government actors.[115] Moreover, though Flint residents were able to settle and receive monetary compensation for the wrongs done to them, it is significant that this outcome was not the result of a judgment for the plaintiffs made on the merits of their claims. The Sixth Circuit in *In re Flint Water Cases* maintained, without reaching into the merits of this claim, that plaintiffs could survive the defendants' motion to dismiss and that they had sustained a plausible allegation that their right to bodily integrity was violated government actors' deliberate indifference.[116] Thus, the Flint cases demonstrate a potential problem for similarly harmed individuals and communities who neither have the resources to sustain years' long legal battles, nor the existence of or accessibility to accurate public reporting on the quality of water services.

While *In re Flint Water Cases* resulted in enormous and deserved settlements for the plaintiffs,[117] individual cases, or even consolidated ones, are woefully ill-equipped to act as a model for affirmative actions that can be taken to prevent actors participating in similar privatized models of water provision from escaping accountability for the quality of services. Attempting to generate comprehensive policy changes solely with claims brought after harms have already accrued is a disproportionately Goliathan task. Thus, advocates have attempted to rely on other avenues, beyond incremental litigation. To secure greater accountability and oversight measures over privatized water systems, one should look to potential changes to existing legislation that would combine both preemptive measures for community members to utilize and disparate impact claims brought by private actors under the Civil Rights Act of 1964.

Title VI of the Civil Rights Act of 1964 ("Title VI") contains a mechanism that environmental advocates had hoped could be used to constrain and direct local programs, such as water distribution, that receive federal funds.[118] Section 601 of Title VI prohibits discrimination based on race, color, and national origin in the state and local

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115 *See Mays*, 916 N.W.2d at 242.

116 *In re Flint Water Cases*, 960 F.3d at 325–32.

117 *See* Paul Egan, *Federal Judge Gives Final Approval to $626.25M Settlement in Flint Water Crisis*, DETROIT FREE PRESS (Nov. 10, 2021), https://www.freep.com/story/news/local/michigan/flint-water-crisis/2021/11/10/federal-judge-approves-settlement-flint-lead-poisoning-case/5556131001/ [https://perma.cc/GH33-NWUX].

118 *See* Soloway, *supra* note 101, at 10043–44; 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, or national origin "under any program or activity receiving Federal financial assistance").

programs and activities federal funds are distributed to.[119] Section 602 authorizes federal agencies to effectuate section 601 via regulations.[120] Under this authority, the U.S. Department of Justice ("DOJ") "promulgated a regulation forbidding [federal] funding recipients to 'utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . .'"[121] In *Alexander v. Sandoval*, the precedent-setting case on how to assess disparate impact claims under Title VI, established that there is no private right of action to bring a disparate impact claim and that private actors pursuing claims under Title VI are required to demonstrate intentional discrimination.[122]

*Sandoval* arose out of a class action brought against the Alabama Department of Transportation.[123] In 1990, Alabama amended its state Constitution to declare English as the state's official language, after which the Alabama Department of Transportation began conducting their driving tests exclusively in English.[124] Plaintiffs claimed that the exclusively English driving test policy violated the DOJ regulation because this policy effectively discriminated against non-English speakers based on their national origin.[125]

Though the District Court held for the plaintiffs,[126] enjoining the policy and ordering the Department to accommodate non-English speakers, and the Eleventh Circuit affirmed this holding,[127] the U.S. Supreme Court held that section 602 does not create a private right of action and dismissed the claims.[128] Justice Scalia, writing for the majority, wrote that a private right of action exists for injunctive relief and damages under section 601,[129] which prohibits only intentional discrimination.[130] The Court held that section 602 regulations can

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119 42 U.S.C. § 2000d.

120 42 U.S.C. § 2000d-1.

121 Alexander v. Sandoval, 532 U.S. 275, 278 (2001) (quoting 28 C.F.R. § 42.104(b)(2) (1999)).

122 *Sandoval*, 532 U.S. at 285; Soloway, *supra* note 101, at 10044.

123 *Sandoval*, 532 U.S. at 279.

124 *Id.* at 278–79.

125 *Id.* at 279.

126 *Id.* (citing Sandoval v. Hagan, 7 F. Supp. 2d 1234 (M.D. Ala. 1998)).

127 *Id.* (citing Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999)).

128 *Id.* at 293; *see* Scott Michael Edson, *Title VI or Bust? A Practical Evaluation of Title VI of the 1964 Civil Rights Act as an Environmental Justice Remedy*, 16 FORDHAM ENV'T. L. REV. 141, 156–57 (2004).

129 *Sandoval*, 532 U.S. at 279.

130 *Id.* at 280.

proscribe activities that cause a disparate impact on racial groups,[131] but concluded that the private right of action to enforce disparate impact regulations must come from the independent force of section 602, not as a derivative of section 601.[132] By looking at the plain language of Title VI and concluding that there was no "rights-creating" language in section 602, the Court limited the ability of private actors to enforce their section 602 rights against agencies.[133] By disposing of the private right of action for disparate impact claims, claimants must rely on only section 601 which requires a showing of intent, so claims brought under Title VI by claimants like Flint residents are likely doomed from the outset.

*Sandoval* was interpreted by the Third Circuit in *South Camden Citizens v. New Jersey Department of Environmental Protection*, which was making its way through the federal courts when *Sandoval* was decided.[134] *South Camden* is especially significant because the factual circumstances of the case mirror the water crisis in Flint.[135] In *South Camden*, the plaintiffs, primarily residents of South Camden, New Jersey, alleged that the New Jersey Department of Environmental Protection ("NJDEP") violated Title VI when it evaluated air permit applications and issued air permits for the operation of a cement facility in a minority neighborhood of Camden, called Waterfront South.[136] The cement facility was built by the St. Lawrence Cement Co. ("SLC") to grind and process granulated blast furnace slag, a by-product of dousing molten iron in either water or steam.[137] This material was then used to manufacture cement products.[138] This process also produced emissions of air pollutants, including dust, "mercury, lead, manganese, nitrogen oxides, carbon monoxide, sulfur oxides, and volatile organic compounds."[139]

The Waterfront South community was a largely minority community, with the contemporaneous census figures finding that ninety-

131 *Id.* at 281.

132 *Id.* at 286.

133 *Id.* at 288.

134 *See* S. Camden Citizens in Action v. N.J. Dep't of Env't. Prot., 275 F.3d 771 (3d Cir. 2001).

135 *See* S. Camden Citizens in Action v. N.J. Dep't of Env't. Prot., 145 F. Supp. 2d 446 (D.N.J. 2001).

136 *Id.* at 451.

137 *Id.* at 450.

138 *Id.*

139 *Id.*

one percent of its residents were persons of color.[140] Fifty percent of this community also lived at or below the federal poverty level, with compounding evidence that the community's health was also substandard.[141] This parallels the community demographics in Flint, Michigan; fifty-seven percent of the Flint population is African American and a "staggering 41.6% of its population lives" below the poverty line.[142] The adverse effects of private enterprises in socioeconomically vulnerable regions are felt disproportionately by those who are the least equipped to survive and recover from it.[143] The plaintiffs stated as much, asserting that the challenged facility would "aggravate and adversely impact" their health through the "emissions of inhalable particulate matter" and the production of ozone.[144]

The trial court in *South Camden* found that the statistical evidence revealed a significant causal relationship between the permitting and placement of these environmentally damaging facilities and the racial demographics of these communities.[145] The lower court was persuaded that the NJDEP allowed the disparate distribution of environmentally toxic facilities in these communities, and that they were unable to provide a "substantial legitimate justification" or a "legitimate, non-discriminatory reason" to rebut the finding of a prima facie case of disparate impact.[146]

Though the district court found in favor of the plaintiffs, this victory was undermined just five days later by the Supreme Court's decision in *Sandoval*.[147] The Third Circuit, though sympathetic to the claimants' allegations,[148] was bound by *Sandoval*, so it reversed the district court's ruling.[149] The Third Circuit held that since section 602 "did not offer a private right of action to uphold a disparate impact suit absent" such explicit language, claimants could not rely on Title VI.[150]

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140 *Id.* at 459.

141 *Id.*

142 Sim, *supra* note 1, at 78.

143 *See S. Camden Citizens in Action*, 145 F. Supp. 2d at 460.

144 *Id.*

145 *Id.* at 492.

146 *Id.* at 483 (quoting Powell v. Ridge, 189 F.3d 387, 393 (3d Cir. 1999)).

147 *See* Haydn Davies, *From Equal Protection to Private Law: What Future for Environmental Justice in U.S. Courts?*, 2 BRIT. J. AM. LEGAL STUD. 163, 172 (2013).

148 *See* S. Camden Citizens in Action v. N.J. Dep't of Env't. Prot., 274 F.3d 771, 784 (3d Cir. 2001).

149 *Id.* at 774; *see* Davies, *supra* note 147, at 173.

150 Davies, *supra* note 147, at 173 (citing *S. Camden Citizens in Action*, 274 F.3d at 790).

*South Camden* and *Sandoval* thus signaled the end of environmental justice advocates' attempts to rely on Title VI.[151]

Though *Sandoval* remains good law, environmental justice advocates have attempted to grant a private right of action under section 602 of Title VI. In 2019, the Environmental Justice for All Act ("EJFAA") was introduced in the House of Representatives as a means of reconciling the aims of environmental justice advocates and the current interpretation of disparate impact discrimination under Title VI.[152] Then-Senator Kamala Harris introduced a related bill in the Senate.[153] The EJFAA would in effect overturn *Sandoval*, which held that there is no private right of action for disparate impact claims brought under Title VI.[154] The relevant language in the EJFAA is as follows:

> (a) CLAIMS BASED ON PROOF OF INTENTIONAL DISCRIMINATION.—In an action brought by an aggrieved person under this title against a covered agency who has engaged in unlawful intentional discrimination (not a practice that is unlawful because of its disparate impact) prohibited under this title (including its implementing regulations), the aggrieved person may recover equitable and legal relief (including compensatory and punitive damages), attorney's fees (including expert fees), and costs of the action, except that punitive damages are not available against a government, government agency, or political subdivision.
>
> (b) CLAIMS BASED ON THE DISPARATE IMPACT STANDARD OF PROOF.—In an action brought by an aggrieved person under this title against a covered agency who has engaged in unlawful discrimination based on disparate impact prohibited under this title (including implementing regulations), the aggrieved person may recover attorney's fees (including expert fees), and costs of the action.[155]

The EJFAA therefore has the potential to make bringing cases to change harmful policies or practices easier for impacted communities, considering that a large portion of the population harmed by inadequate water distribution are minorities and live below the poverty line.[156] This would permit local residents to litigate against policies or

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151 *See id.*

152 H.R. 5986, 116th Cong. (2020).

153 S. 4401, 116th Cong. (2020).

154 Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

155 H.R. 5986 § 6.

156 *See* Sim, *supra* note 1, at 78.

projects that use federal funds and resources to engage in environmental discrimination, thus overturning *Sandoval*. Potential cases brought under Title VI would receive greater consideration, much like the lower court gave the plaintiffs in *South Camden* before *Sandoval* abruptly stopped it in its tracks. The bill would allow private actors to bring disparate impact cases and return part of the enforcement of the prohibition of disparate impact discrimination to the hands of individuals and community members. Thus, EJFAA has the potential to restore and bolster the right of private actors to legally challenge environmental discrimination under Title VI and to ensure greater accountability.

Not only would this bill overturn *Sandoval*, but it also details mechanisms through which communities and individuals could preemptively constrain or prevent the implementation of policies or programs that are potentially harmful. The EJFAA provides for opportunities for local community members to participate in proposals that may affect environmental justice in their communities.[157] The EJFAA would accomplish the desired changes by amending the Civil Rights Act of 1964, in relevant part, to assert that:

> (b)(1)(A) Discrimination (including exclusion from participation and denial of benefits) based on disparate impact is established under this title if—
>
> (i) a covered agency has a program, policy, practice, or activity that causes a disparate impact on the basis of race, color, or national origin and the covered entity fails to demonstrate that the challenged program, policy, practice, or activity is related to and necessary to achieve the nondiscriminatory goal of the program, policy, practice, or activity alleged to have been operated in a discriminatory manner; or
>
> (ii) a less discriminatory alternative program, policy, practice, or activity exists, and the covered agency refuses to adopt such alternative program, policy, practice, or activity.
>
> (B) With respect to demonstrating that a particular program, policy, practice, or activity does not cause a disparate impact, the covered agency shall demonstrate that each particular challenged program, policy, practice, or activity does not cause a disparate impact, except that if the covered agency demonstrates to the courts that the elements of the covered

157 *See* Amy Laura Cahn, *Testimony: Environmental Justice for All Act Protects Vulnerable Communities*, FACING S. (Feb. 17, 2022), https://www.facingsouth.org/2022/02/testimony-environmental-justice-all-act-protects-vulnerable-communities [https://perma.cc/4MEE-CX39].

> agency's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as 1 program, policy, practice, or activity.[158]

By allowing for consideration of cumulative impact in the legal analysis of whether there was discrimination, the burden is easier for plaintiffs to meet than the shock the conscience standard applied in *Mays*. Individuals would be able to bring forth evidence that points to factors that make them or their communities more sensitive to environmental pollution and health risks.[159] The bill would require a showing that the proposed program or policy does not create, with reasonable certainty, harm to human health as a prerequisite to issuing a permit.[160] Additionally, section 14 would require federal agencies seeking to implemental new environmental programs to provide early and robust community involvement, including but not limited to producing community impact reports,[161] public comment periods,[162] public community hearings,[163] and providing notice of new proposals to organizations that may be particularly impacted—such as grassroots organizations led by people of color and homeowners' associations[164]—and requiring that communication of these notices are targeted so that communities of color and low-income communities have access.[165] By requiring certain health and safety guarantees prior to the application of a policy or program, such oversight may mitigate the devastating impact visited upon communities such as Flint, who had to endure years of contaminated drinking water and long legal battles before arriving at a settlement.

## IV. RECOMMENDATIONS FOR ENVIRONMENTAL JUSTICE AND ESSENTIAL GOVERNMENT FUNCTIONS

The provision of basic necessities such as healthcare, education, water, and housing are public goods in the broader political sense and as a moral consideration.[166] The immediate health, long-term

158 H.R. 5986 § 4.
159 *Id.* § 7.
160 *Id.* § 7(a)(1).
161 *Id.* § 14(b).
162 *Id.* § 14(e)(2).
163 *Id.* § 14(e)(3)(A).
164 *Id.* § 14(e)(3)(B).
165 *Id.* § 14(f)(1).
166 K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2450 (2018).

economic well-being, and social vigor of communities overwhelmingly depend on the community's ability to access these basic necessities. Disparate access to these public goods therefore presents a particularly insidious form of inequality.[167] Changing from a public governance model for water services to one of privatization potentially hails wide-ranging effects because the process of providing water supply and wastewater treatment services affects actors outside of the traditional market parties of supplier and consumer. Whereas private entities usually factor in the relationship between themselves, as suppliers of goods and services, and their consumers, the nature of water as a basic tenant of human survival invariably changes this dynamic. Thus, transferring to a private model of water services may have a significant detrimental impact on the local community, economy, and environment.

The lack of access to and availability of these services creates a unique state of vulnerability. The means in which communities govern and administer these necessities are fault lines upon which social and economic exclusion and inequality rests.[168] Those institutions or corporations who wield control or exercise conditioning power over the provision of and access to these necessities can essentially "construct systematic forms of inequality and exclusion, exacerbating systemic racial and economic inequities."[169]

Privatization transfers the financing and control of these basic necessities from public entities, who are comparatively more accountable and public facing than private entities, to private corporations and their financial investors.[170] This then introduces deeply problematic profit-driven incentives which further encourages private companies to shield their patterns and practices from public accountability.[171] The influx of investment in privatization efforts further bids up the price of basic necessities, accelerating the affordability crisis.

With the quantity of private companies contracted to perform government functions drastically increasing, there has not been a proportional increase in the quantity of government employees dedicated to supervision.[172] There has been a reduction of high level government officers responsible for oversight, despite the growing need for

167 *Id.* at 2476–77.
168 *Id.* at 2450.
169 *Id.*
170 *Id.* at 2452.
171 *Id.*
172 Verkuil, *supra* note 4, at 399 n.2.

contracting oversight responsibilities.[173] A lack of oversight and disciplinary measures is a tragic consequence of privatization, resulting from a supervisory imbalance between those in government, such as key expert personnel critical to surveillance, and private contractors.[174]

Privatization agreements can also be harmful to the public at large, not just the poorest sectors. Under certain circumstances, privatization of water resources can take away local ownership of water systems, which can in turn harm the public interest. One of the most sensitive issues regarding water privatization is the loss of control of water rights and shifts in allocation; this can be more contentious than the economic issues presented by privatization.[175]

Customers expect their water provider to meet standards of public health and safety, as well as environmental stewardship.[176] Privatizing governmental functions such as water services creates an expanded need for contractual oversight, monitoring, and enforcement. As the delivery of water supply is transferred from the public sector to the private sector, government oversight bodies ought to ensure that private actors can be held substantially accountable through enforcement mechanisms as to effectively monitor the performance of those private entities and service contract provisions.

In both Flint and Buenos Aires, the regulatory oversight bodies were largely toothless in their ability to hold these private actors responsible, regardless of how much monitoring and reporting was conducted. The quantity of supervisory officials, while important, is not necessarily a dispositive factor; rather both adequate supervisory officials and rigorous accountability measures are required. The private actors in both instances were prioritizing maximizing their bottom lines without any substantial care or regard for the lives impacted by their willful disregard, and they only paid lip service to water quality standards and expansion of access to water. This further complicates the dynamic of the government as an overseer and the private contractor as the overseen. Though the interests and purposes of the

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173 *Id.* at 399.

174 *Id.* at 399–400.

175 *See* CHARLES V. STERN, CONG. RSCH. SERV., R44148, INDIAN WATER RIGHTS SETTLEMENTS (2022) (reporting that despite Indigenous communities having senior water rights on reservations, federal policy has mandated resolving "Indian water rights disputes through negotiated settlements, which could take years to complete" leading to lack of access to consistent clean water).

176 NAT'L RSCH. COUNCIL, PRIVATIZATION OF WATER SERVICES IN THE UNITED STATES: AN ASSESSMENT OF ISSUES AND EXPERIENCE 6 (2002).

government are inherently different from that of the private contractor, ensuring strong commitment to the oversight process could aid in building a sustainable relationship and provision of water services.[177]

The oversight and monitoring roles are implicated differently depending on the type of privatization. The most common form of privatization in the water services industry is through private contractors, who act as operators and maintainers of water plants, or through private firms contracted to design, build, and operate a facility.[178] This most common form, often referred to as simply outsourcing to private contractors for water utility plant operation and maintenance, is particularly relevant for cities considering privatizing their water supply systems. The oversight and monitoring implications for these communities include "loss of some degree of control over a vital public service, uncertain control during emergencies, loss of expertise (which would make reversal of operations difficult), requirements for adequate contract supervision, and [concerns] for water quality, environmental values, [and] public health."[179]

Furthermore, because the goals and interests at stake for public agencies and private contractors are different, contracts ought to be meticulously designed and oversight rigorously implemented to protect the public interests, civic responsibility, and environmental stewardship. While privatization of public goods and services may not automatically entail a deterioration of said services, without specific clauses for monitoring and enforcement in such agreements, privatization measures may have disastrous results. This is an especially difficult balance for governmental agencies to maintain because, although the government is not directly providing the service, the public agency is responsible for oversight, regardless of the specific terms of the contractual agreement, so agencies are ultimately responsible for the provision of safe water and wastewater treatment.

Oversight is also needed to ensure that privatization efforts do not create greater inefficiencies than the ones that the privatization itself is meant to resolve. Therefore, the governing body must be able to retain some ability to monitor the performance of the private entities providing water services and must be ready to take over operations

177 *Id.* at 102.

178 Ramos, *supra* note 7, at 194; *see generally* Symposium, *Water Privatization Overview: A Public Interest Perspective on For-Profit, Private Sector Provision of Water and Sewer Services in the United States*, 14 J.L. SOC'Y 167 (2013).

179 NAT'L RSCH. COUNCIL, *supra* note 176, at 4–5.

should the private ones fail.[180] Understanding this, cities have attempted to impose regulation through a commission tasked with oversight and monitoring of these private entities, though these commissions often fall short of ensuring accountability.[181] As exemplified in the circumstances surrounding the Flint water crisis, these inadequacies include, but are not limited to, reluctance on the part of commission and agency personnel to respond to, and at times actively concealing, the overwhelming evidence of pollution, and the lack of reporting, investigation, and punitive measures embedded in contracts with water companies that could be animated should non-fulfilment occur.[182]

As the purposes and goals of private and public actors are different, so are the myriad structural and procedural means of accountability. For government actors and agencies, "the key accountability relationships … are those between the citizens and the holders of public office and, within the ranks of office holders, between elected politicians and bureaucrats."[183] The same cannot be said for private entities. The notions of accountability for government actors, and implicitly for democratic accountability, are compromised with the outsourcing of vital services like water supply.[184] In understanding the differing goals of private and public actors, accountability measures could be enforced at the contractual level, with accountability mechanisms baked into water contracts.

For example, contracts with water companies could explicitly require consistent water quality testing for toxic or corrosive materials, congruent with prevailing health standards, and include investigative efforts and remedial measures that are immediately animated upon failure of these tests. Another means of accountability is to embed community members directly into regulatory bodies.[185] Community members could be granted a majority within the regulatory body,

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180 *Id.* at 7.

181 *Id.*

182 *Id.*

183 Richard Mulgan, *"Accountability": An Ever-Expanding Concept?*, 78 PUB. ADMIN. 555, 556 (2000).

184 *See* Kimberly N. Brown, *"We the People," Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347 (2013).

185 *See* Mike Muller, Robin Simpson & Meike van Ginneken, *Ways to Improve Water Services By Making Utilities More Accountable to Their Users: A Review* 28 (World Bank, Water Working Note No. 15, 2008), https://documents1.worldbank.org/curated/en/389131468338350788/pdf/442250NWP0WN151Box0327398B01PUBLIC1.pdf [https://perma.cc/S7SV-6DDC].

equal voting power, and equal access to background information as government officials. Through a majority of a voting bloc, community membership on commissions could be more empowered to grant or withhold water distribution contracts to private actors depending on their fulfillment of these contracts, including any embedded health requirements. Other means of increasing community involvement in the granting of contracts to private water distribution companies could be through community outreach, such as hosting town hall meetings or alerting mechanisms that act as a direct line of notification to the regulatory body of the presence of waste. Additionally, oversight bodies could require private water companies that are granted concessions to provide periodic reporting on the state of their activities and distribution, as well as require increased public accessibility to information on local water quality.[186] This could be in the form of call centers or online databases, for example.

What is needed is innovative and effective government oversight of water supplies and facilities, and not the decentralized, essentially extralegal position that private entities exercise over water systems, further complicating the responsibility of providing water for the consuming public. Private controls over water sources and systems ought to subject themselves to and embrace the oversight and policies that aim to protect the integrity and health of water sources through monitoring, frequent review, and rigorous accountability mechanisms.

## V. CONCLUSION

Inherent government functions such as the regulation, monitoring, maintenance, and supply of water requires rigorous oversight and reporting mechanisms to ensure that water, the most fundamental of human necessities, is duly supplied and up to environmental and health standards.[187] That is not to say that delegating an inherent government function to a private entity is inherently malicious, nor does it mean that doing so would be a guaranteed prediction of disaster. The water privatization models in both Flint and Buenos Aires were largely man-made tragedies produced by a combination of the voracious appetites of private water companies and the utter failure of civil servants and government bodies to hold those companies accountable. However, the inability to hold private entities accountable is not singularly

186 *Id.* at 25.

187 *See* Mays v. Snyder, 916 N.W.2d 227, 241 (Mich. Ct. App. 2018) (detailing that water facility supervisors and state reports warned of dangerously high lead levels that were unsafe for ingestion).

due to differing goals but rather due to a lack of enforcement and accountability mechanisms. Evidently, this primary objective of profit has led to the gutting of wastewater treatments and adequate supply of potable water in both Flint and Buenos Aires, that has had injurious and at times, fatal consequences. Operations of government programs are less profit-driven, or, at the very least, could implement enforcement mechanisms that demand higher standards of care that go into water treatment, and which hold the private entities they oversee accountable.